85-1160

Supreme Court, U.S.
FILED
JAN 8 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

TEXAS ENERGY INVESTMENT CORP. AND ADVANCED TECHNOLOGY, LTD.,
Petitioners,

v.

NIMROD MARKETING (OVERSEAS) LTD. AND TOM ANDERSON-SLIGHT,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

DANA G. KIRK*
KENNETH B. COLE, JR.
3900 One Shell Plaza
900 Louisiana
Houston, Texas 77002
(713) 228-7210
*Counsel of Record

Attorneys for Petitioners

Of Counsel:

KIRK & CARRIGAN, P.C.

Alpha Law Brief Co., Inc.—5606 Parkersburg—Houston, Texas 77036—223-3003

I. QUESTION PRESENTED FOR REVIEW

Whether a defendant, when timely demand for a jury trial has been made and no waiver of that demand has occurred, is entitled to a jury trial under the seventh amendment to the United States Constitution if the plaintiff's theory of recovery is promissory estoppel but the sole remedy sought and awarded is the legal remedy of money damages.

II. LIST OF PARTIES

All of the parties in the United States Court of Appeals for the Fifth Circuit are listed in the caption.

Additionally, the following listed persons have an interest in the outcome of this case and are listed in order that the Justices of this Court may evaluate possible disqualification or recusal:

1. Texas Energy Petroleum Corporation
2. James Allison
3. Texas Energy International S.A.
4. Texas Reserve Construction Company

III. TABLE OF CONTENTS

		Page
I.	Question Presented for Review	1
II.	List of Parties	1
III.	Table of Contents	II
IV.	Table of Authorities	III
V.	Opinion Below	2
VI.	Jurisdiction of this Court	2
VII.	Constitutional and Statutory Provisions Involved	2
VIII.	Statement of the Case	3
IX.	Reasons for Granting the Writ	5
	A. THE FIFTH CIRCUIT'S OPINION IS INCONSISTENT WITH THE DECISION OF THIS COURT IN *CURTIS V. LOETHER*, 415 U.S. 189 (1974)	5
	1. An Historical Analysis Supports Petitioners' Position	7
	2. Respondents Sought the Legal Remedy of Money Damages	11
	3. Necessary Findings of Fact Were Within the Province of a Jury's Abilities	13
	B. FEDERAL CIRCUIT COURTS OF APPEALS CONFLICT ON THE ISSUE OF WHETHER JURY TRIALS ARE REQUIRED WHEN EQUITABLE THEORIES OF RECOVERY ARE ESPOUSED	14
	C. THIS COURT HAS NOT, BUT SHOULD, DECIDE THIS IMPORTANT AND FUNDAMENTAL QUESTION OF CONSTITUTIONAL PROTECTION	15
X.	Conclusion	16
	Appendix	1a

IV. TABLE OF AUTHORITIES

CASES	Page
A. R. Clark Investment Co. v. Green, 375 S.W.2d 425 (Tex. 1964)	8
Beacon Theaters, Inc. v. Westover, 359 U.S. 500 (1959)	13
Cooley v. Strickland Transportation Co., 459 F.2d 779 (5th Cir. 1972)	9, 10
Curtis v. Loether, 415 U.S. 189 (1974)	5, 6, 11, 16
Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962)	13, 14
Damsky v. Zavatt, 289 F.2d 46 (2d Cir. 1961)	10
Earlie v. Jacobs, 745 F.2d 342 (5th Cir. 1984)	9, 14
Gefen v. United States, 400 F.2d 476 (5th Cir. 1968)	10
Levine v. Loma Corp., 661 S.W.2d 779 (Tex. Civ. App.—Ft. Worth 1983, no writ)	8
Mintzer v. Arthur L. Wright & Co., 263 F.2d 823 (3rd Cir. 1959)	7, 11
Moore v. Sun Oil Co. of Pennsylvania, 636 F.2d 154 (6th Cir. 1980)	15
Nimrod (Overseas) Ltd. v. Texas Energy Investment Corp., 769 F.2d 1079-80	4, 6, 12
Novack Investment Co. v. Setser, 657 F.2d 962 (8th Cir.), *cert. denied*, 454 U.S. 1064, 102 S. Ct. 615, 70 L.Ed.2d 601 (1981)	14, 15
Ross v. Bernhard, 396 U.S. 531 (1970)	7, 14
Setser v. Novack Investment Co., 638 F.2d 1137 (8th Cir. 1981)	15

Page

UNITED STATES CONSTITUTION

Seventh Amendment 1, 2, 4, 5, 6

UNITED STATES STATUTES

28 U.S.C. § 1254(1) 2

FEDERAL RULES OF CIVIL PROCEDURE

Rule 38(a) 6

BOOKS AND TREATISES

Moore's Federal Practice, § 38.11[6] 5, 7, 8, 12
W. Prosser, *Law of Torts* 728 (5th ed. 1984) 8
Wright, *Federal Courts* 450-51 (3d ed. 1979) 7, 9, 13, 14

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

TEXAS ENERGY INVESTMENT CORP. AND ADVANCED TECHNOLOGY, LTD.,
Petitioners,

v.

NIMROD MARKETING (OVERSEAS) LTD. AND TOM ANDERSON-SLIGHT,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners respectfully seek a writ of certiorari to review the opinion of the United States Court of Appeals for the Fifth Circuit denying petitioners their right to a jury trial under the seventh amendment to the United States Constitution.

V. OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 769 F.2d 1076 (5th Cir. 1985), and a copy is included in the Appendix. Additionally, a copy of the Fifth Circuit's denial of all parties' Petitions for Rehearing is included in the Appendix.

VI. JURISDICTION OF THIS COURT

The opinion of the Fifth Circuit was issued on August 30, 1985. Counsel for both sides subsequently filed timely Petitions for Rehearing, and the appellate court denied these Petitions for Rehearing on October 10, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

VII. CONTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioners' right to a jury trial is secured by the seventh amendment to the United States Constitution which states:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

U.S. Const. amend. VII.

Jurisdiction in this Court is based on 28 U.S.C. § 1254 (1) which states:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree. . . .

28 U.S.C. § 1254(1).

VIII. STATEMENT OF THE CASE

This case was tried in the United States District Court for the Southern District of Texas. Jurisdiction was based on diversity of citizenship. Respondent Nimrod is a United Kingdom corporation with its principal place of business in London, England.[1] FFCL, Rec. V. p. 1. Respondent Anderson-Slight is an individual who resides in London, England. *Id.* The trial court found that petitioners conduct their principal business in Houston, Texas. *Id.* pp. 1-2. The trial court, sitting in diversity, applied the Texas law of promissory estoppel to the facts of this case. *Id.* pp. 1, 18-21. Central issues in the case including piercing of the several separate and distinct corporate entities which form Texas Energy and whether or not the parties had indeed executed a legally sufficient contract. However, these issues are not presented in this petition, and accordingly, this statement does not discuss them.

Respondents demanded a jury trial in their initial pleading. *Plaintiff's Original Complaint,* Rec. VII. p. 3. Respondents restated their demand for a jury trial in the first amended complaint. *Plaintiffs' First Amended Com-*

---

1. Abbreviated references include the following:
   Rec: denotes documents included in the *Record Excerpts,* including pleadings, memoranda and orders of the Trial Court, *Findings of Fact and Conclusions of Law,* and portions of the trial transcript;
   FFCL: denotes the Trial Court's *Findings of Fact and Conclusions of Law;*
   Tr.: denotes page references from the transcript of proceedings;
   LL: denotes precise lines from pages of the transcript of proceedings. Because of the voluminous nature of these records, counsel for petitioners has not asked the Clerk of the Fifth Circuit to certify copies for this Court's use. Counsel for petitioners will, however, arrange for such certification of copies upon request.

plaint, Rec. VI. p. 6. Immediately prior to the trial of this case, on September 8, 1983, Dana G. Kirk, counsel for petitioners, specifically requested a trial by jury. Tr. September 8, 1983, Rec. VIII. pp. 5-7. The district court summarily overruled Mr. Kirk's request on the basis of waiver. *Id.* p. 7. The district court refused to address this issue in *Defendants' Motion for New Trial or Alternatively Motion to Amend Judgment. Memorandum and Order,* Rec. III. p. 1 ("Defendants' first three grounds are meritless"). The case was tried before the district court sitting without a jury.

On appeal to the Fifth Circuit, both parties submitted extensive briefing on the issues of waiver of the seventh amendment right to a jury trial and the issue of whether a constitutionally enforceable right to a jury trial exists if the plaintiffs' theory of recovery is promissory estoppel but they seek and are awarded solely the legal remedy of money damages. The Fifth Circuit held that petitioners had not waived their right to a jury trial, but further held that petitioners were not entitled to a jury trial in a promissory estoppel case anyway. *Nimrod (Overseas) Ltd. v. Texas Energy Investment Corp.,* 769 F.2d at 1079-80. Petitioners prosecute this Petition for Writ of Certiorari on the grounds that a right to a trial by jury did exist and was held to be non-existent by the Fifth Circuit in contravention of the seventh amendment to the United States Constitution. Petitioners ask this Court to allow any briefing or oral arguments it deems necessary on this issue and to ultimately reverse the Fifth Circuit's decision in this regard and order this case to be remanded to the District Court for the Southern District of Texas for a new trial before a duly selected jury.

IX. REASONS FOR GRANTING THE WRIT

A. THE FIFTH CIRCUIT'S OPINION IS INCONSISTENT WITH THE DECISION OF THIS COURT IN *CURTIS V. LOETHER*, 415 U.S. 189 (1974).

This Court unanimously has held that the basic nature of the remedy sought controls a litigant's right to a jury trial. *Curtis v. Loether*, 415 U.S. 189 (1974). In *Curtis*, this Court held that the right to a jury trial was applicable because the damages sought under a Title VIII cause of action were analogous to damages sought in traditional common law tort causes of action. *Id.* at 196. *See Moore's Federal Practice*, § 38.11[6], at 38-86 ("Although an action for rescission and cancellation is equitable, where such an action is brought to cancel an insurance policy because of fraud and the defendant counterclaims for the proceeds for the policy, the basic nature of the issue as thus presented is legal.") In its August 30, 1985, opinion, however, the Fifth Circuit chose to cite the *Curtis* opinion to support its decision to deny petitioners their right to a jury trial.

The seventh amendment to the Constitution unequivocally states that:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

U.S. Const. amend. VII. Under the Federal Rules of Civil Procedure "[t]he right of trial by jury as declared

by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate." Fed. R. Civ. P. 38(a).

The Fifth Circuit's reliance on *Curtis v. Loether,* therefore, was incorrect because that opinion supports the constitutional principle allowing jury trials. Even the language from the *Curtis* opinion that the Fifth Circuit chose to quote states that a right to a jury trial exists in "suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, *and equitable remedies were administered. . . .*" *Nimrod Marketing v. Texas Energy,* 769 F.2d at 1079, quoting *Curtis v. Loether,* 415 U.S. at 193.

Petitioners draw the Court's attention to the emphasized language—"and equitable remedies were administered." This Court used the inclusive conjunction "and" in its *Curtis* opinion for a reason. It intended that a jury trial would be allowed unless both of two factors existed: first, that only equitable rights were being recognized; and second, that only equitable remedies were being administered. Petitioners contend that respondents have from the inception of this lawsuit sought the *legal* remedy of monetary damages.

One commentator has set forth the rule governing the situation before this Court today as follows:

> In general, there is no right to a trial by jury of claims that historically were "equitable," such as actions for injunction, specific performance, and the like. There is a right to trial by jury in actions that historically would have been considered "legal," of which actions for money damages for tort or breach

> of contract are the most familiar examples. If new causes of action are created unknown at common law, the courts must look to the nearest historical analogy to decide whether there is a right to a jury.

Wright, *Federal Courts* 450-51 (3d ed. 1979).

1. An Historical Analysis Supports Petitioners' Position

The first factor that this Court should analyze to determine the right to a jury trial in this case is the historical perspective or custom regarding the nature of the remedy that respondents sought. *Ross v. Bernhard*, 396 U.S. 531, 538 (1970); *Mintzer v. Arthur L. Wright & Co.*, 263 F.2d 823 (3rd Cir. 1959). Neither general historical jurisprudence nor the Fifth Circuit's own authority in its opinion support the position which that court has adopted.

The law is well settled that actions recognized at common law should be tried to a jury if a timely demand for a jury is made. *Moore's Federal Practice*, at 38-78. The nature of the *remedy* that respondents sought, as is clear from their amended complaint and the agreed pretrial order, was money damages. Even though the *theory* advanced by respondents was promissory estoppel, therefore, they sought and received a traditional common law remedy.

In addition to the nature of the remedy that the respondents sought, which classifies this cause of action as one that is subject to the right to a jury trial, an historical perspective reveals common law causes of action that are very analogous to the present one. Two such common law causes of action are trespass on the case, which embraces suits for fraud and deceit, and special assumpsit,

a common law cause of action to recover damages on a simple contract. *Moore's Federal Practice,* at 38-78 to 38-80. The analogy of the present case to an action to recover damages on a simple contract is clear. For a clear understanding of the analogy to fraud and deceit, however, it is necessary to compare the elements of the common law action and the elements of a promissory estoppel cause of action.

The elements of the common law cause of action for fraud are material false representation, knowledge on the part of the defendant of falsity, intent that the plaintiff act upon the false representation, justifiable reliance on the part of the plaintiff, and injury to the plaintiff. *Levine v. Loma Corp.,* 661 S.W.2d 779, 783 (Tex. Civ. App.—Ft. Worth 1983, no writ); W. Prosser, *Law of Torts* 728 (5th ed. 1984). The Texas Supreme Court has defined the action in promissory estoppel very similarly. In *A. R. Clark Investment Co. v. Green,* 375 S.W. 2d 425 (Tex. 1964), the Texas Supreme Court stated that "the party claiming the estoppel must show that a false representation or concealment of material facts exist. Furthermore, the party to whom such false representation was made must have relied on or acted on it to his prejudice." *Id.* at 435. The only real difference between these two causes of action is the degree of intent on the part of the defendant. Estoppel may, at least in theory, require less of an element of intent on the defendant's part. In reality, however, these causes of action are almost identical, and the nature of each of them requires findings of fact that fall within the ambit of a jury's realm of expertise, not purely legal determinations by the court.

One commentator has described the historical difference between law and equity as follows: "The jurisdictional

line that divided Westminster Hall was drawn largely, if not exclusively, in terms of the remedy sought." Wright, *Federal Courts* at 451. The remedy that the respondents sought was money damages, clearly a legal remedy. Respondents' cause of action was extremely analogous to the common law cause of action for fraud or deceit and the common law cause of action for special assumpsit, and the right to a jury trial therefore should be based upon the fact that jury trials traditionally have been allowed in both of these common law causes of action.

In addition, the decisions cited by the Fifth Circuit to support its position to deny petitioners their right to a jury trial are all distinguishable from this case. First, *Earlie v. Jacobs,* 745 F.2d 342 (5th Cir. 1984), involved a claim for *injunctive relief* for reinstatement and back pay, and appended illusory claims for actual and punitive damages. The Fifth Circuit based its decision in *Earlie* on the fact that injunctive relief seeking court-ordered reinstatement into a job is equitable in nature. The remedy of injunctive relief clearly is equitable, yet it also clearly is different from respondent's claim for money damages in this lawsuit.

Second, *Cooley v. Strickland Transportation Co.,* 459 F.2d 779 (5th Cir. 1972), dealt with the issue of whether the seventh amendment guarantees the right to a jury composed of twelve, as opposed to six, jurors. The Fifth Circuit's holding in that case was "that the twelve-member panel is not a necessary requirement of 'the right of trial by jury' in civil cases." *Id.* at 780. The legal issue analyzed and the holding rendered, therefore, do not in any way support the contention that petitioners were not entitled to a jury trial in this case. To the contrary, as far as *Cooley* is analogous to this case, it supports petitioners'

position. *Cooley* involved a suit for money damages for wrongful death and a jury was allowed. The only issue was how large the jury would be. Likewise, respondents have sought money damages and a jury trial should have been allowed.

Last, in *Gefen v. United States,* 400 F.2d 476 (5th Cir. 1968), the Fifth Circuit dealt with the foreclosure of federal tax liens. The Fifth Circuit quoted from Judge Friendly's opinion in *Damsky v. Zavatt,* 289 F.2d 46 (2d Cir. 1961), in which Judge Friendly stated the following:

> Foreclosure of the mortgagor's equity of redemption was an established head of equity jurisdiction well before 1791, How v. Vigures, 1 Rep. Ch. 32, 21 E.R. 499 (1623); Emanuel College v. Evans, 1 Rep. Ch. 18, 21 E.R. 494 (1625); and this necessarily embraced the determination of the amount and validity of the mortgage debt. 1 Glenn, Mortgages (1943), 399-400. The more modern method of foreclosure through decree of sale, provided for United States tax liens by I.R.C. § 7043, is sufficiently akin to the historic equity practice to preclude successful contention for a right to jury trial with respect to the ascertainment of the amount of tax lien as against taxpayer's property and enforcement of the lien by sale.

Id. at 53, quoted favorably in *Gefen v. United States,* 400 F.2d at 478. Respondents' claim for money damages, to the contrary, is not "an established head of equity jurisdiction." Rather, respondents' claim for money damages on a theory of promissory estoppel is analogous to the common law legal causes of action for trespass on the case and special assumpsit.

2. Respondents Sought the Legal Remedy of Money Damages

The second factor that this Court should consider is the nature of the remedy sought by respondents. The nature of the *remedy* that respondents sought, as is clear from their amended complaint and the agreed pre-trial order, was money damages. The record is replete with evidence that the true nature of respondents' cause of action does not at all seek traditional equitable remedies, but sounds loudly and unequivocably as an action for money damages. For example, the respondents in the instant case sought two million dollars in damages in the trial court. *Plaintiffs' First Amended Complaint,* Rec. VI. p. 6. In the pre-trial order, submitted jointly by the parties, the respondents claimed a cause of action based upon the *theory* of promissory estoppel, claiming *damages* for restocking charges, cancellation of transportation arrangements, subsistence, out-of-pocket expenses, travel expenses and, additionally, lost profits and commissions. *Joint Pre-Trial Order,* Rec. XI, p. 3. Also, the agreed contested issues of fact included *damages* suffered by respondents as a result of lost profits and commissions. *Id.* at p. 10. Additionally, respondents stated in their prayer for relief that "Plaintiffs pray that the liability of the Defendants be established and that Plaintiffs be awarded just and reasonable damages and for general relief." *Plaintiffs' First Amended Complaint,* Rec. VI. p. 6 (emphasis added). Based upon this record, this Court's decision in *Curtis v. Loether,* and the Third Circuit's conclusion that "[g]enerally it is the form of relief prayed which determines whether a claim sounds at law or in equity," *Mintzer v. Arthur L. Wright & Co.,* 263 F.2d 823 (3rd Cir. 1959), the Fifth Circuit should have recognized that petitioners had a right to jury trial

in this lawsuit. Even the Fifth Circuit's own discussion of recoverable damages in this case blended any seeming distinction between equity and law and referred to "losses resulting from collateral *contracts*" that "are recoverable in *an action for breach of contract.*" *Nimrod Marketing (Overseas) Ltd. v. Texas Energy Investment Corp.*, 769 F.2d 1080. (emphasis added).

Even though the *theory* advanced by respondents was promissory estoppel, therefore, they sought and received a traditional common law remedy. One commentator has discussed this distinction between seeking the remedy of damages and advancing an equitable claim. The commentator stated the following:

> [A] claim for damages for breach of contract is legal and a claim against the debtor's transferree to set aside the transfer as fraudulent is usually equitable; a claim to enjoin violation of the anti-trust acts is equitable and a claim for damages under the acts is legal; a claim to enjoin repeated trespasses is equitable and a claim for a statutory penalty for the trespass is legal; a claim for damages for negligent injury to property is legal and a claim to enjoin future injury is equitable.
>
> At times a plaintiff (or other claimant) may have a choice of remedies. Some contracts, for example, are of such a nature that specific performance will be compelled, so the injured party may frame his complaint for specific performance and the issues are equitable. On the other hand, if he frames his complaint to recover damages, the issues are legal. The holder of a patent, copyright or a trademark may seek only the equitable remedies of an injunction and an equitable accounting; or he may seek only legal relief, damages; or he may seek both the equitable *and* legal remedies.

Moore's Federal Practice, at 38-85 to 38-86.

Respondents did not seek to set aside a transfer. Respondents did not seek an injunction. Respondents did not seek specific performance. Respondents did not seek an equitable accounting. At all times, respondents sought money damages. Additionally, the trial court awarded respondents money damages. The remedy sought by respondents, therefore, undeniably was money damages and was, therefore, legal in nature at common law; and in modern jurisprudence, such a cause of action requires findings of fact that should be determined by a jury. This Court has zealously guarded the right to a jury trial under the seventh amendment, Wright, *Federal Courts* at 448, and the Fifth Circuit should not allow that right to be infringed upon simply because the respondents worded their complaint under the guise of promissory estoppel. As this Court has stated, "The Constitutional right of trial by jury cannot be made to depend upon the choice of words used in the pleadings." *Dairy Queen, Inc. v. Wood,* 369 U.S. 469, 477-78 (1962). Equitable relief is allowed only where the remedy at law is inadequate. *Id.; Beacon Theaters, Inc. v. Westover,* 359 U.S. 500 (1959); Wright, *Federal Courts* at 453. Respondents obviously did not feel that their remedy at law was inadequate. The only remedy for which they asked was the legal remedy of money damages. This Court, therefore, should not allow inapplicable equitable principles to be applied by the Fifth Circuit, and petitioners' right to a jury trial under the seventh amendment should not be infringed.

3. Necessary Findings of Fact Were Within the Province of a Jury's Abilities

In addition to the historical perspective and the nature of the remedy sought, this Court has indicated that the practical abilities and limitations of a jury should have

been considered to decide the right of petitioners to a jury trial. *Ross v. Bernhard,* 396 U.S. at 736; *Dairy Queen, Inc. v. Wood,* 369 U.S. 469 (1962) (an equitable accounting is available only when the legal remedy is inadequate because the accounts are so complicated that the court alone can satisfactorily unravel them).

The facts in the instant case were not so complicated that a jury could not easily deal with them and reach a just conclusion as to the fact issues presented. A jury could have, and should have, been allowed to determine the simple issue of which party was telling the truth about certain disputed facts. Such determinations have for years fallen within the well recognized and well-respected province of the jury. As one commentator has stated, "[M]aintenance of the jury as a fact finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to jury trial should be scrutinized with the utmost care." Wright, *Federal Courts* at 448.

B. FEDERAL CIRCUIT COURTS OF APPEALS CONFLICT ON THE ISSUE OF WHETHER JURY TRIALS ARE REQUIRED WHEN EQUITABLE THEORIES OF RECOVERY ARE ESPOUSED.

In its opinion in this case, the Fifth Circuit cited *Earlie v. Jacobs,* 745 F.2d 342 (5th Cir. 1984), to support its conclusion. In the *Earlie* decision, however, the Fifth Circuit specifically recognized that all of the federal circuit courts of appeal do not agree with the approach to jury trials espoused in that decision. *Id.* at 344, citing *Novack Investment Co. v. Setser,* 657 F.2d 962 (8th Cir.), *cert. denied,* 454 U.S. 1064, 102 S. Ct. 615, 70 L.Ed.2d 601 (1981).

Justices White, Brennan, and Marshall of this Honorable Court filed a strong dissent to the denial of the petition for writ of certiorari in *Novack Investment Co. v. Setser,* 102 S. Ct. at 615-617, because of this conflict between the circuit courts on the issue of right to a jury trial in equitable situations. *See id.,* citing *Setser v. Novack Investment Co.,* 638 F.2d 1137 (8th Cir. 1981) and *Moore v. Sun Oil Co. of Pennsylvania,* 636 F.2d 154 (6th Cir. 1980). While these cases are factually distinguishable, the theory as it relates to jury trials is the same, and the petitioners urge this Court, therefore, to grant this Petition for Writ of Certiorari in the instant case so that this conflict among the Fifth, Sixth, and Eighth Circuits can once and for all be laid to rest.

C. THIS COURT HAS NOT, BUT SHOULD, DECIDE THIS IMPORTANT AND FUNDAMENTAL QUESTION OF CONSTITUTIONAL PROTECTION.

This Court should apply the long established principles of right to jury trials to the issue of promissory estoppel presented to the Court for decision in this case. The Court can use this case to establish the broad precedent that when a legal remedy is sought the seventh amendment right to a jury trial should be held inviolate.

The right to a jury trial is a zealously protected right in American jurisprudence. In the instant case, this fundamental right was denied by the trial court on the theory of waiver. The Fifth Circuit specifically found that no waiver had in any manner occurred. Based on these facts, this Supreme Court and no other should decide if the right to a jury trial did indeed exist.

This matter is of substantial importance in our judicial system, which traditionally has lauded itself because of

the inimitable and irreplaceable right it provides to trial by a jury of one's peers. Such an infringment of this right as exists in this case merits the granting of this Petition for Writ of Certiorari.

X. CONCLUSION

Petitioners respectfully submit that the Fifth Circuit's opinion of August 30, 1985, wrongfully denied petitioners' right to a jury trial under the seventh amendment to the Constitution. The Fifth Circuit's opinion conflicts with the principles of this Court's decision in *Curtis v. Loether*, and further provides this Court with the opportunity to not only resolve a conflict among the circuits but also to establish unequivocally that when legal remedies are sought the litigants are constitutionally entitled to a jury trial on all factual issues presented by the case. Petitioners, therefore, pray that this Court grant their Petition for Writ of Certiorari, allow any briefing or oral arguments thereon it deems necessary, and ultimately reverse the appellate court's decision and remand this case for a trial of all factual issues before a duly impaneled jury.

Respectfully submitted,

DANA G. KIRK*
KENNETH B. COLE, JR.
3900 One Shell Plaza
900 Louisiana
Houston, Texas 77002
(713) 228-7210
*Counsel of Record

Attorneys for Petitioners

Of Counsel:

KIRK & CARRIGAN, P.C.

APPENDIX A

NIMROD MARKETING (OVERSEAS) LTD.
and T. Anderson-Slight,
Plaintiffs-Appellees,

v.

TEXAS ENERGY INVESTMENT CORP., et al.,
Defendants-Appellants.

No. 84-2247.

United States Court of Appeals,
Fifth Circuit.

Aug. 30, 1985.

Purchasing agent brought action against participants in joint venture formed to build low-cost housing for Russian steelworkers in Nigeria seeking cancellation charges and expenses resulting from breach of purchasing agent agreement. After bench trial, the United States District Court for the Southern District of Texas, Ross N. Sterling, J., entered judgment in favor of purchasing agent on doctrine of promissory estoppel and awarded damages, and participants in joint venture appealed. The Court of Appeals, Politz, Circuit Judge, held that: (1) participants in joint venture did not waive jury trial; (2) participants in joint venture had no right to trial by jury; (3) purchasing agent was entitled to recover cancellation charges; and (4) proper rate of exchange between British pound sterling and dollars was date as of judgment, not date as of breach.

Affirmed in part, vacated and remanded in part.

Fulbright & Jaworski, Dana G. Kirk, John B. Beckworth, Houston, Tex., for defendants-appellants.

Talbert, Giessel & Stone, Steven P. Mock, Alice M. Giessel, Houston, Tex., for plaintiffs-appellees.

Appeal from the United States District Court for the Southern District of Texas.

Before GARZA, POLITZ and DAVIS, Circuit Judges.

POLITZ, Circuit Judge:

Nimrod Marketing (Overseas) Ltd. and its president, Tom Anderson-Slight, invoked diversity jurisdiction and sued Texas Energy Investment Corp. and Advanced Technology, Ltd. (ATL) for cancellation charges and expenses resulting from a breach of a purchasing agent agreement. After a bench trial, the district court found liability based on the doctrine of promissory estoppel and awarded damages. Texas Energy and ATL appeal contending that the court erred (1) in denying their request for a jury trial, (2) in allowing recovery for cancellation charges, and (3) in calculating the dollar damages. We find no error in the jury trial and recovery allowance issues but find error in the damage calculation. Accordingly we affirm in part, reverse in part and remand for entry of an appropriate judgment.

Facts

Texas Energy,[1] a Texas-based oil trading company under contract with the Nigerian government, formed a joint venture with Nigerian investors to build low-cost

1. Texas Energy refers to a group of companies, Texas Energy Investment Corporation, Texas Energy Petroleum Corporation, Texas Energy International, S.A., and Texas Reserve Construction Company, which the trial court found operated as a single entity.

housing for Russian steelworkers in Ajaokuta, Nigeria. In furthering the venture, Texas Energy and the Nigerians formed a partnership cognomened Advanced Technology Ltd.

The partners were immediately confronted with the complex task of getting building materials, equipment, and supplies into Nigeria and arranging for payment with Nigerian funds. In May of 1981, while returning to London from a trip to Lagos, made to conclude the contract with the Nigerian government, William A. Houston, construction superintendent for Texas Energy, found himself serendipitously seated next to Tom Anderson-Slight, president of Nimrod. Nimrod, an international trading company with extensive experience in international trading, had had numerous dealings in West Africa in the prior decade. Upon learning of Texas Energy's need for help in the purchasing and shipping of goods to Nigeria, Anderson-Slight told Houston of his company's expertise and expressed an interest in acting as Texas Energy's purchasing agent for the Nigerian project. During the week that followed, Houston, Anderson-Slight, and Homi Toni Boga, Nimrod's Executive and Technical Director responsible for preparation of schedules, estimates, material selection and purchases, met in London to discuss the project in depth. At that time Anderson-Slight and Boga examined in detail a list supplied by Texas Energy of items needed for the project including equipment, construction material, food and living quarters. Following those meetings, Nimrod provided price quotes for items on the list and, subsequently, for items on an updated list.

In late August, Anderson-Slight met in Houston with senior officials of Texas Energy to explain the documenta-

tion necessary for shipments to Nigeria. During Anderson-Slight's four-day stay in Houston, purchase orders were issued by ATL. Items were color-coded to reflect priority in shipment. The initial purchase orders covered items color-coded green, indicating those items to be shipped immediately. Verbal purchase orders were also issued at that time.

During this August 1981 visit to Houston, Anderson-Slight was given two "comfort" letters dated September 1, 1981 and September 2, 1981, appointing Nimrod as purchasing agent for the Nigerian project. The first letter authorized Nimrod to purchase upon order of ATL. The second letter authorized Nimrod to act upon orders of Texas Energy.

Acting pursuant to the comfort letters, purchase orders, and verbal authorizations of ATL employees, Anderson-Slight began acquiring equipment and materials from Nimrod suppliers. In addition, Nimrod incurred expenses for several trips to Nigeria between June and October of 1981.

Several weeks later the matter ground to a halt. At a meeting in Houston sometime between October 31, 1981 and November 4, 1981, Texas Energy representatives informed Anderson-Slight that because of a disagreement over financing with their Nigerian partners they were withdrawing from the project. Unable to resolve their differences, Nimrod and Anderson-Slight filed suit seeking damages for expenses and charges incurred in cancelling the contracts with its suppliers. They grounded their claims on promissory estoppel. At the time of trial, despite receipt of demand letters and threats of litigation, no supplier had filed suit against Nimrod, opting instead

to forego legal action until the conclusion of the instant suit.

Nimrod originally requested a jury trial but withdrew that request at a pretrial conference. Texas Energy and ATL promptly asked for a trial by jury, a request reflected in the pretrial order and repeated at the outset of the trial. The district court denied the request on a finding that Texas Energy and ATL had waived their demand for trial by jury.

After a bench trial, judgment was rendered in favor of Nimrod and Anderson-Slight on a finding that they had relied on the "comfort letter" of September 1, 1981 to their detriment. Damages for cancellation charges and out-of-pocket expenses incurred after receipt of that letter were awarded. In computing the cancellation charges the trial court applied the monetary exchange rate for British pounds sterling into United States dollars applicable on the date of the breach of the agreement. The exchange rate at that time was $1.90/1 pound sterling. The exchange rate on the date of final judgment, January 26, 1984, was $1.4045/1 pound sterling. The rate as of this writing is near $1.30/1 pound sterling. The rate has obviously varied markedly in the time period involved.

Analysis

A. Jury Trial.

[1] Texas Energy and ATL insist that they did not waive jury trial and maintain that the trial court erred in denying their request. We are persuaded that the trial court erred in concluding that Texas Energy and ATL waived a jury trial. They were entitled to rely on Nimrod's demand for jury and it was not necessary that they assert

that demand until Nimrod withdrew its request. *Pinemont Bank v. Belk*, 722 F.2d 232 (5th Cir. 1984); *Southland Reship, Inc. v. Flegel*, 534 F.2d 639 (5th Cir. 1976). Their request was timely.

The Federal Rules of Civil Procedure provide the mechanism for waiver of a requested jury trial. Rule 39(a) provides in pertinent part:

> The trial of all issues so demanded shall be by jury unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury. . . .

Texas Energy and ATL entered no written or oral stipulation consenting to trial by the court. To the contrary, the pretrial order shows that they demanded trial by jury immediately after Nimrod expressed a willingness to waive its demand. That request was repeated at the beginning of the trial and consistently maintained to and through the appeal.

[2-4] Although the trial court inadvertently erred in finding waiver, it did not err in declining Texas Energy and ATL's request for a jury trial. Plaintiffs' complaint was not triable by jury. The seventh amendment is not absolute; it does not assure a trial by jury of all justiciable disputes. As the Supreme Court observed in *Curtis v. Loether*, 415 U.S. 189, 193, 94 S. Ct. 1005, 1007, 39 L.Ed.2d 260 (1974) (*quoting in part Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 446-47, 7 L.Ed. 732 (1830)):

> [I]t has long been settled that the right extends beyond the common-law forms of action recognized [in 1791]. . . . "The phrase 'common law,' found in

> this clause, is used in contradistinction to equity, and admiralty, and maritime jurisprudence . . . not merely suits, which the *common law* recognized among its old and settled proceedings, but suits in which *legal* rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered. . . ."

See also Earlie v. Jacobs, 745 F.2d 342 (5th Cir. 1984); *Cooley v. Strickland Transp. Co.,* 459 F.2d 779 (5th Cir. 1972); *Gefen v. United States,* 400 F.2d 476 (5th Cir. 1968). Promissory estoppel is an equitable form of action in which equitable rights alone are recognized. *Wheeler v. White,* 398 S.W.2d 93 (Tex. 1965); *Richey v. Miller,* 142 Tex. 274, 177 S.W.2d 255 (1944); *Keene v. Gold,* 27 S.W.2d 631 (Tex. Civ. App. 1930). Defendants had no right to trial by jury; there was nothing to waive.

B. Recovery of Cancellation Charges

Texas Energy and ATL argue that the court erred in allowing recovery for cancellation charges because those charges had not been paid to Nimrod's suppliers as of the date of trial. The suppliers had apparently agreed to defer their claims pending the outcome of the instant litigation. Appellants maintain that the damages awarded for the cancellation charges were speculative and contingent. We find this argument without merit.

[5] Under well-settled Texas law, losses resulting from collateral contracts are recoverable in an action for breach of contract if the breaching party "had knowledge of the special circumstances producing such damages." *Longview Const. & Dev., Inc. v. Loggins Const. Co.,*

523 S.W.2d 771, 777 (Tex. Civ. App.—Tyler 1975); *Texas Power & Light Co. v. Barnhill,* 639 S.W.2d 331 (Tex. App.—Texarkana 1982), *writ ref'd n.r.e.*

[6] It is beyond peradventure that Texas Energy and ATL were aware that Nimrod and Anderson-Slight promptly began placing orders for supplies, equipment, and material pursuant to the September 1, 1981 comfort letter and the written and oral purchase orders for such goods. They clearly had knowledge of the special circumstances producing damages upon their breach of the purchasing agent agreement. The trial court did not err in finding them liable for these damages.

[7] Texas Energy and ATL would find shelter in the apparent willingness of Nimrod's creditors to forebear their right to exact payment from Nimrod pending the outcome of this suit. They misperceive the prevailing rule. This action by Nimrod's creditors does not constitute a release of a legal obligation inuring to defendants' benefit. *Aubrey v. Workman,* 384 S.W.2d 389 (Tex. Civ. App.—Fort Worth 1964). *See Kennard v. McCray,* 648 S.W.2d 743 (Tex. App.—Tyler 1983). Nor were the charges contingent and speculative. They were specific and certain. The trial court found the incurred charges to be: Consortex, S.A., 116,250 U.S. dollars; A. G. Knight, 81,666 British pounds sterling; Inder., 66,710 British pounds sterling; and Map Speed Freight, 37,912 British pounds sterling.

C. Rate of Exchange.

Texas Energy and ATL contend that the district court erred in its calculation of damages in dollars. They maintain that the court should have converted the amounts

due the three suppliers in British pounds sterling into dollars as of the date of judgment, not the date of the breach. We agree that the trial judge erred in this respect.

[8-10] Recovery under the theory of promissory estoppel is limited to "the amount necessary to compensate that party for a loss already suffered." *Sun Oil Co. (Delaware) v. Madeley,* 626 S.W.2d 726, 734 (Tex. 1981); *Wheeler v. White,* 398 S.W.2d 93 (Tex. 1965). One recovering under promissory estoppel should not be penalized, nor should one experience a windfall. The contracts call for Nimrod to pay most of the cancellation damages in British pounds sterling. Nimrod has not yet paid those debts and to be made whole should receive the amount in dollars that will purchase the precise number of pounds required for those payments. To avoid both penalty and windfall the court should direct payment in dollars convertible from British pounds sterling based on the exchange rate on the date the corrected judgment is enterred.

The judgment of the district court is AFFIRMED except as to the calculation of damages. That part of the judgment is VACATED and the matter is REMANDED for entry of a judgment consistent herewith.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 84-2247

NIMROD MARKETING (OVERSEAS) LTD. and
T. ANDERSON-SLIGHT,
Plaintiffs-Appellees,

v.

TEXAS ENERGY INVESTMENT CORP., ET AL.,
Defendants-Appellants.

Appeal from the United States District Court for the
Southern District of Texas

ON PETITIONS FOR REHEARIN

(October 10, 1985)

Before, GARZA, POLITZ and DAVIS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petitions for rehearing filed in the above entitled and numbered cause be and the same are hereby DENIED. The mandate should reflect the assessment of interest from date of entry of corrected judgment.

ENTERED FOR THE COURT:

By: /s/ HENRY A. POLITZ
United States Circuit Judge

Supreme Court, U.S.
FILED
FEB 8 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. 85-1164

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

TEXAS ENERGY INVESTMENT CORP. AND ADVANCED TECHNOLOGY, LTD.,
Petitioners,

v.

NIMROD MARKETING (OVERSEAS) LTD. AND TOM ANDERSON-SLIGHT,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ALICE M. GIESSEL*
HENRY P. GIESSEL
2700 Two Houston Center
909 Fannin Street
Houston, Texas 77010-1063
(713) 759-1990

*Counsel of Record

Attorneys for Respondents

Of Counsel:
GIESSEL, STONE, BARKER & LYMAN, INC.

Alpha Law Brief Co., Inc.—5606 Parkersburg—Houston, Texas 77036—223-3003

I. QUESTIONS PRESENTED FOR REVIEW

Whether the Fifth Circuit Court of Appeals erred in holding that defendants were not entitled to a jury trial under the seventh amendment to the United States Constitution when the plaintiff's theory of recovery was promissory estoppel, even though the sole relief sought and awarded was money damages.

Whether defendants in this case waived their right, if any, to a jury trial.

II. TABLE OF CONTENTS

	Page
I. QUESTIONS PRESENTED FOR REVIEW	1
II. TABLE OF CONTENTS	ii
III. TABLE OF AUTHORITIES	iii
IV. STATEMENT OF THE CASE	2
V. REASONS FOR DENYING THE WRIT	3
A. THE DOCTRINE OF PROMISSORY ESTOPPEL IS ESSENTIALLY EQUITABLE IN NATURE ..	3
1. Texas Authority	3
2. Out-of-State Authority	4
B. THE FIFTH CIRCUIT'S OPINION IS NOT INCONSISTENT WITH THE DECISION OF THIS COURT IN *CURTIS V. LOETHER*, 415 U.S. 189 (1974)	6
C. THERE IS NO CONFLICT IN THE FEDERAL CIRCUIT COURTS OF APPEALS ON THE ISSUE OF WHETHER JURY TRIALS ARE REQUIRED WHEN A CLAIM IS BROUGHT UNDER THE THEORY OF PROMISSORY ESTOPPEL	8
D. THIS COURT SHOULD NOT GRANT CERTIORARI IN THIS CASE	8
E. PETITIONERS WAIVED THEIR RIGHT, IF ANY, TO A TRAL BY JURY	9
VI. CONCLUSION	12

III. TABLE OF AUTHORITIES

CASES — Page

Bush v. Allstate Ins. Co., 425 F.2d 393 (5th Cir. 1970) ... 10
C & K Engineering Contractors v. Amber Steel Company, 587 P.2d 1136 (1978) ... 5, 6, 7
Chapman v. Kleindist, 507 F.2d 1246 (7th Cir. 1974) ... 11
Curtis v. Loether, 415 U.S. 189 (1974) ... 6, 7, 8
Earlie v. Jacobs, 745 F.2d 342 (5th Cir. 1984) ... 8
Moore v. Sun Oil Co. of Pennsylvania, 636 F.2d 154 (6th Cir. 1980) ... 8
Reid Bros. Logging Co. v. Ketchikan Pulp Co., 699 F.2d 1292 (9th Cir.), *cert. denied*, 104 S. Ct. 279 ... 10
Setser v. Novack Investment Co., 638 F.2d 1137 (8th Cir. 1981) ... 8
Smith v. Cushman Motor Works, Inc., 178 F.2d 953 (8th Cir. 1950) ... 10
U.S. v. Moore, 1951, 71 S. Ct. 524, 340 U.S. 616, 95 L.Ed 582 ... 10
Walters v. Marathon Oil Company, 642 F.2d 1098 (7th Cir. 1981) ... 4, 5, 7, 8
Wheeler v. White, 398 S.W.2d 93 (1965) ... 3, 4, 7

UNITED STATES STATUTES

42 U.S.C. § 1981 ... 8

THE RESTATEMENT OF CONTRACTS

Section 90 ... 3

TEXTS

9 Wright & Miller, *Federal Practice and Procedure*, § 2321 (1971) ... 10

NO. 85-1164

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

TEXAS ENERGY INVESTMENT CORP. AND ADVANCED TECHNOLOGY, LTD.,
Petitioners,

v.

NIMROD MARKETING (OVERSEAS) LTD. AND TOM ANDERSON-SLIGHT,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Nimrod Marketing (Overseas) Ltd. and Tom Anderson-Slight, respectfully request the Court to deny the petition for a writ of certiorari sought to overturn the opinion of the Fifth Circuit Court of Appeals in this case.

IV. STATEMENT OF THE CASE

This case was tried in the United States District Court for the Southern District of Texas. Jurisdiction was based on diversity of citizenship. Respondent Nimrod is a United Kingdom corporation with its principal place of business in London, England.[1] FFCL, Rec. V. p. 1. Respondent Anderson-Slight is an individual who resides in London, England. *Id.* The trial court found that both petitioners conduct their principal business in Houston, Texas. *Id.* pp. 1-2. The trial court, sitting in diversity, applied the Texas law of promissory estoppel to the facts of this case. *Id.* pp. 1, 18-21.

The case was tried by the district court without a jury. The Fifth Circuit held that petitioners had not waived their right to trial by jury, but further held that petitioners were not entitled to a jury trial in a promissory estoppel case. Nimrod Marketing (Overseas) Ltd. v. Texas Energy Investment Corp., 769 F.2d at 1079-80. The judgment was affirmed except as to the exchange rate used in calculation of damages. This holding by the Fifth Circuit in regard to damages is the subject of a cross-petition filed in this Court by respondents as cross-petitioners.

---

1. Abbreviated references include the following:
   Rec: denotes documents included in the *Record Excerpts*, including pleadings, memoranda and orders of the Trial Court, *Findings of Fact and Conclusions of Law*, and portions of the trial transcript;
   FFCL: denotes the Trial Court's *Findings of Fact and Conclusions of Law;*
   Tr.: denotes page references from the transcript of proceedings;
   LL: denotes precise lines from pages of the transcript of proceedings. Because of the voluminous nature of these records, counsel for petitioners has not asked the Clerk of the Fifth Circuit to certify copies for this Court's use. Counsel for petitioners will, however, arrange for such certification of copies upon request.

V. REASONS FOR DENYING THE WRIT

A. THE DOCTRINE OF PROMISSORY ESTOPPEL IS ESSENTIALLY EQUITABLE IN NATURE.

1. Texas Authority

The Texas Supreme Court has recognized the equitable nature of a cause based on promissory estoppel. *Wheeler v. White,* 398 S.W.2d 93 (1965). Texas follows The Restatement of Contracts, § 90 which says:

> "A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding *if injustice can be avoided* only by enforcement of the promise." [emphasis supplied] 398 S.W.2d at 96.

The court went on to discuss the application of the doctrine as follows:

> The binding thread which runs through the cases applying promissory estoppel is the existence of promises designedly made to influence the conduct of the promisee, tacitly encouraging the conduct, which conduct, although not necessarily constituting any actual performance of the contract itself, is something that must be done by the promisee before he could begin to perform, and was a fact known to the promisor. As to the argument that no new cause of action may be created by such a promise regardless of its established applicability as a defense, it has been answered that where one party has by his words or conduct made to the other a promise or assurance which was intended to affect the legal regulations between them and to be acted

> on accordingly, then, once the other party has taken him at his word and acted on it, the party who gave the promise cannot afterward be allowed to revert to the previous relationship as if no such promise had been made. This does not create a contract where none existed before, but only prevents a party from insisting upon his strict legal rights *when it would be unjust to allow him to enforce them*. See 1 Williston, Contracts, §§ 139-40 (Rev. ed. 1936); and 48 A.L.R.2d 1069 (1956). [Emphasis supplied] 398 S.W.2d at 96.

The court limited recovery to the detriment sustained, disallowing damages based on loss of anticipated profits, holding that when there is actually no legally sufficient contract, "all that is required *to achieve justice* is to put the promisee in the position he would have been in had he not acted in reliance upon the promise", 398 S.W.2d at 97, [emphasis supplied]. The question of the right to a jury trial was not discussed, since under Texas jurisprudence such right does not depend upon the legal or equitable nature of the cause of action and the remedy.

In the trial of the case *sub judice* Judge Sterling correctly recognized the essentially equitable nature of the relief that he ordered when he stated,

> The Court thus concludes that *injustice would result unless* Plaintiffs are permitted a partial recovery—in the amounts set forth below—to enforce the promise made by Defendants. (FFCL, Rec. V, p. 26, emphasis supplied).

2. Out Of State Authority

In *Walters v. Marathon Oil Company*, 642 F.2d 1098 (7th Cir. 1981), the court found in favor of plaintiff on the theory of promissory estoppel. This was a bench

trial, but the issue of the availability of a jury trial was not addressed. The court clearly found that promissory estoppel is an equitable doctrine, with the court, sitting in equity, having the power to fashion the remedy "to do complete justice", in other words, to fashion an equitable remedy.

> An equity court possesses some discretionary power to award damages in order to do complete justice. [citations omitted] Furthermore, since it is the historic purpose of equity to secure complete justice, the courts are able to adjust the remedies so as to grant the necessary relief, [citations omitted] and a district court sitting in equity may even devise a remedy which extends or exceeds the terms of a prior agreement between the parties, if it is necessary to make the injured party whole. [citation omitted]
>
> Since promissory estoppel is an equitable matter, the trial court has broad power in its choice of a remedy, and it is significant that the ancient maxim that "equity will not suffer a wrong to be without a remedy" has long been the law in the State of Indiana. 642 F.2d at 1100.

The *Walters* court held that in reliance upon the defendant's promise, the plaintiffs had invested both time and money and had foregone the opportunity to make the investment elsewhere. An award of lost profits was "appropriate in order to do complete justice."

The California Supreme Court has directly addressed the issue of the right to a jury trial in a promissory estoppel case in *C & K Engineering Contractors v. Amber Steel Company*, 587 P.2d 1136 (1978). The court reviewed the writings of various treatise writers and commentators and concluded that:

> ". . . the doctrine of promissory estoppel is essentially equitable in nature, developed to provide a remedy (namely, enforcement of a gratuitous promise) which was not generally available in courts of law prior to 1850. 587 P.2d at 1139.

The California court went on to determine that there was no right to a trial by jury. Its Constitution has a provision similar to the Seventh Amendment, which limits the guarantee of a jury trial to such right as existed at common law in 1850. The plaintiff's request for a money recovery did not convert his action into an "action at law" because damages at law were unavailable in actions for breach of a gratuitous promise. Without the employment of the essentially equitable doctrine of promissory estoppel, there was no remedy at all.

> . . . [I]n the present case, the trier of fact is called upon to determine whether "Injustice can be avoided only by enforcement of [defendant's] promise." (Rest., Contracts, § 90.) The "gist" of such an action is equitable. Both historically and functionally, the task of weighing such equitable considerations is to be performed by the trial court, not the jury. We conclude that the trial court properly treated the action as equitable in nature, to be tried by the court with or without an advisory jury as the court elected. (587 P.2d at 1141).

B. THE FIFTH CIRCUIT'S OPINION IS NOT INCONSISTENT WITH THE DECISION OF THIS COURT IN *CURTIS v. LOETHER*, 415 U.S. 189 (1974).

In *Curtis v. Loether,* the Supreme Court held that a jury trial was available on proper demand in an action

brought to redress violations of Title VIII of the Civil Rights Act of 1968. The court held that the constitutional right to jury trial was not limited to the common law forms of action that existed in 1791, but was equally applicable to statutory causes of action "if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law." 415 U.S. at 194. The court analogized the statute's specific allowance of actual damages as creating an action sounding basically in tort with the statute merely defining a new legal duty.

Promissory estoppel cannot be analogized to a tort. Neither is it an action on a contract, even though one may have been contemplated by the parties. "This [promissory estoppel] does not create a contract where none existed before . . ." *Wheeler v. White,* 398 S.W.2d 93 (Tex. Sup. 1965). It is comparing apples to oranges to compare a promissory estoppel action with its equitable remedy to an action seeking damages for breach of contract (even those where fraud and deceit are involved). The traditional remedy for breach of contract is the granting to plaintiff the benefit of the bargain as if the contract had been performed, usually translated into money damages; in promissory estoppel cases the remedy is to fashion relief that will avoid injustice, usually translated into a money recovery based on detrimental reliance. The respondents based their case solely on promissory estoppel and sought only the remedies afforded by that theory of recovery. The equitable nature of such a claim is supported by authority cited herein, particularly *Walters v. Marathon Oil Company, supra* and *C & K Engineering Contractors v. Amber Steel Company, supra.*

C. THERE IS NO CONFLICT IN THE FEDERAL CIRCUIT COURTS OF APPEALS ON THE ISSUE OF WHETHER JURY TRIALS ARE REQUIRED WHEN A CLAIM IS BROUGHT UNDER THE THEORY OF PROMISSORY ESTOPPEL.

Petitioners have pointed to no federal cases holding that a jury trial is required when a claim is brought under the theory of promissory estoppel. The federal case cited by respondents clearly held that promissory estoppel is an equitable doctrine with a remedy, including an award of damages, to be determined by "an equity court". *Walters v. Marathon Oil Company, supra.*

The cases cited by petitioners to indicate a conflict all deal with rights under 42 U.S.C. § 1981. The Fifth Circuit in *Earlie v. Jacobs,* 745 F.2d 342 (5th Cir. 1984) held that a claim for reinstatement and back pay is equitable in nature. *Accord, Moore v. Sun Oil Co. of Pennsylvania,* 636 F.2d 154 (6th Cir. 1980); *Contra Setser v. Novack Investment Co.,* 638 F.2d 1137 (8th Cir. 1981).

D. THIS COURT SHOULD NOT GRANT CERTIORARI IN THIS CASE.

Petitioners seek to have this court grant certiorari in this case to establish a broad precedent that whenever a monetary relief is sought, a jury trial is required, regardless of the nature of the proceedings. Such a holding would be overly broad and has never been and should not be applied to a case based on the equitable doctrine of promissory estoppel. Such an overly broad holding was specifically rejected in *Curtis v. Loether, supra,* at 1009, when this Court stated,

> We need not, and do not, go so far as to say that any award of monetary relief must necessarily be "legal" relief.

E. PETITIONERS WAIVED THEIR RIGHT, IF ANY, TO A TRIAL BY JURY.

As an additional argument against the granting of writ of certiorari to determine petitioners alleged right to a trial by jury, respondents would also urge that petitioners waived any right to jury trial that they may have had. This was the ruling of the district judge. The Fifth Circuit denied waiver.

At the time of the trial the court was under the impression that the case was non-jury and, upon looking, did not find the jury demand in the complaint. Defense counsel, at the cout's urging, also looked through the pleadings and stated he was unable to find a jury demand. Defense counsel then relied upon his jury request made in the pre-trial order, which was obviously past the twenty-day limit. By his conduct, defense counsel waived whatever reliance he may have placed on the initial pleadings, which did contain a jury demand, and explicitly left the matter to the court's discretion. The court had already expressed its opinion that this was not a case where the jury would be much help and the court properly overruled the defense's belated jury request. Tr. Sept. 8, 1983, Rec. VIII, pp. 5-7, attached hereto as an appendix.

The failure of counsel for petitioners to indicate or demonstrate to the court that a jury demand had been made, when, and by whom, when ample opportunity was provided by the court, including inviting the defense

counsel to review the court's file, constitutes waiver of defense counsel's right to rely upon the respondents' jury demand.

Further evidence of the fact that counsel for petitioners waived his right to rely upon respondents' prior jury demand is found in the transcript of the proceedings, wherein it is reflected that counsel for petitioners indicated to the court "And let's leave it to the Court's discretion, I guess". *Ibid,* p. 5, Ll. 22, 23.

The right to jury trial, like other constitutional rights, can be waived by the parties. *U.S. v. Moore,* 1951, 71 S. Ct. 524, 527, 340 U.S. 616, 95 L.Ed. 582. *See generally* 9 Wright & Miller, *Federal Practice and Procedure,* § 2321 (1971). For instance, the failure to make a timely demand will result in a waiver even though it was inadvertent and unintended. 9 Wright & Miller, op. cit. § 2321, p. 102; *Bush v. Allstate Ins. Co.,* 425 F.2d 393, 396 (5th Cir. 1970).

The right to jury trial may also be waived by conduct of the parties. In *Smith v. Cushman Motor Works, Inc.,* 178 F.2d 953 (8th Cir. 1950), appellant failed to object to a bench trial until after a complete trial wherein the key question was found against appellant. In our case, petitioners failed to particularly point out to the court the jury demand upon which they allegedly relied until after a complete trial in which the court held against them.

In *Reid Bros. Logging Co. v. Ketchikan Pulp Co.,* 699 F.2d 1292 (9th Cir.), *cert. denied,* 104 S. Ct. 279, the defendant's consistent efforts to defeat the plaintiff's jury request demonstrated that defendant was not relying

upon that request and constituted a waiver of defendant's right to object when plaintiff withdrew its jury request. In our case, petitioners' failure or refusal to point out to the court respondents' jury request upon which they now allege that they relied constituted a waiver to object to the trial by the court.

In *Chapman v. Kleindist,* 507 F.2d 1246 (7th Cir. 1974), the appellate court, in reviewing the record believed that the trial judge, who conducted a hearing without a jury, was simply unaware of the jury demand. The court held that, normally, the failure to object under such circumstances would constitute a waiver of the right to a jury trial. (The plaintiff was entitled to a jury trial on remand only because he had not been represented by counsel). Similarly, in our case the trial judge believed that there had been no jury demand. The petitioners failed to make a meaningful objection by pointing out to the court any jury demand in the record; petitioners chose to rely instead on their own late jury demand, appealing to the discretion of the court.

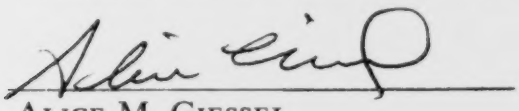
The petitioners waived any right they might have to rely upon respondents' jury demand by failing or refusing to point out to the court, prior to trial or during trial, the jury request upon which they relied. It was, apparently, only after an adverse verdict that petitioners were able to discover what they now claim was obvious. The petitioners chose to waive and abandon a claim to that right and presented to the court instead their own belated request. The court, in its discretion, properly denied their jury demand.

CONCLUSION

For the above-enumerated reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

GIESSEL, STONE, BARKER & LYMAN



ALICE M. GIESSEL
HENRY P. GIESSEL
2700 Two Houston Center
909 Fannin Street
Houston, Texas 77010-1063
(713) 759-1990

Attorneys for Respondents
Nimrod Marketing (Overseas) Ltd.
and Tom Anderson-Slight

APPENDIX

Excerpt From The Transcript Of Testimony, Tr. Sept. 8, 1983, Rec. VIII, pp. 5-7

THE COURT: All right. We will take up Civil Action H-81-3275, Nimrod Marketing Overseas, Limited, versus Texas Energy Investment Corporation and others.

MR. KIRK: Your Honor, excuse me, Dana Kirk for the Defendant. We had a little misunderstanding about whether there was a Jury or a nonjury. The Defendants had planned a Jury and put that in the pretrial and for some reason that slipped through the cracks. We would respectfully request a Jury trial in this case.

THE COURT: I noticed that in the pretrial order and this is one of them where I thought I had kind of brow-beat everybody into the notion that we wouldn't have a Jury or was that another case? I have been known to attempt that.

MR. KIRK: I think the last—I wasn't at the last docket call, Judge, because I was out of town. But at the time before you asked if it would be nonjury and I respectfully requested a Jury and I don't think you brow-beat us too much. But I did request a Jury at that time.

THE COURT: Well, that was at that docket call. Had you done it prior to that?

MR. KIRK: Yes, I done it on my answer I am quite sure, although I would like to consult the pleadings to make doubly sure of that and I thought Henry had also in his answer. But—I don't know whether I did or not. But it was in the pretrial order.

THE COURT: Well, all right. Let's—for openers it's not noted on the front of the docket sheet.

MR. GIESSEL: I always thought it was nonjury, but I may be mistaken too.

THE COURT: Well, let's take a look. Let's take a look. Well, let's look first at the complaint as to whether or not there's any. No Jury demand in the complaint. Let's look at the original answer. Number 16, is that what you told me?

THE CLERK: Yes, sir.

MR. KIRK: You usually put it at the bottom, Judge. If it was there it's likely it's at the bottom.

THE COURT: I don't find it, Mr. Kirk.

. . . .

MR. KIRK: Well, I thought that it was either in Henry's complaint or amended complaint or in my answer or my amended answer. And we did make it in the pre-trial order and the Defendant would request a Jury in this case. And let's leave it to the Court's discretion, I guess.

THE COURT: Well, I'll be delighted for you to look here. It's supposed to be made within 20 days after issue is joined, if I remember the rule correctly.

MR. KIRK: You understand of course we have no doubt that the Court would be fair in the case; it's just that we think our case would be tried a little better to a Jury.

THE COURT: Well, I think your case in front of a Jury would be just a situation of trying to get them so mixed up and confused they would just be guessing.

. . . .

MR. KIRK: I don't find it in our pleading file and I do for the record adhere to my request for a Jury.

THE COURT: Oh, all right, It's overruled. We will try it without a Jury.

Supreme Court, U.S.
FILED
FEB 27 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. 85-1164

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

TEXAS ENERGY INVESTMENT CORP. AND ADVANCED TECHNOLOGY, LTD.,
Petitioners,

v.

NIMROD MARKETING (OVERSEAS) LTD. AND TOM ANDERSON-SLIGHT,
Respondents.

PETITIONERS' SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

DANA G. KIRK*
KENNETH B. COLE, JR.
3900 One Shell Plaza
900 Louisiana
Houston, Texas 77002
(713) 228-7210
*Counsel of Record

Attorneys for Petitioners

Of Counsel:

KIRK & CARRIGAN, P.C.

Alpha Law Brief Co., Inc.—5606 Parkersburg—Houston, Texas 77036—223-3003

NO. 85-1164

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

TEXAS ENERGY INVESTMENT CORP. AND ADVANCED TECHNOLOGY, LTD.,
Petitioners,

v.

NIMROD MARKETING (OVERSEAS) LTD. AND TOM ANDERSON-SLIGHT,
Respondents.

PETITIONERS' SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

I. RELATIONSHIP OF PARTIES

Pursuant to the request of the Court, petitioners provide the following information regarding the relationship of the parties who have an interest in the outcome of this case. Texas Energy Petroleum Corporation is the parent company. Texas Energy International S.A., Texas Reserve Construction Company, and petitioners are substantially or wholly owned subsidiaries of the parent company.

II. OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

Attached hereto is a copy of the Memorandum and Order of the United States District Court for the Southern District of Texas, Houston Division.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-81-3275

NIMROD MARKETING (OVERSEAS) LTD.
and TOM ANDERSON-SLIGHT

v.

TEXAS ENERGY INVESTMENT CORPORATION
AND ADVANCED TECHNOLOGY, INC.

Talbert, Giessel & Stone (Henry P. Giessel), Houston, Texas, Attorneys for Plaintiffs.

Fulbright & Jaworski (Dana Kirk), Houston, Texas, Attorneys for Defendants.

(Filed April 18, 1984)

MEMORANDUM AND ORDER

In Defendants' pending motion for new trial or alternatively motion to amend the judgment, Defendants argue that (1) the Court improperly denied a jury trial, (2) the recovery of cancellation charges is supported by insufficient evidence, (3) the Court incorrectly found liability against the Defendants and (4) the judgment should be amended to be payable in part in foreign currencies at the rate of exchange in effect on the date of judgment.

Defendants' first three grounds are meritless.

As to Defendants' fourth claim, it is well settled that "a money judgment entered by an American court must be in United States currency." *Jamaica Nutrition Holdings v. United Shipping,* 643 F.2d 376, 379 n. 5 (5th Cir. 1981). *See also Frontera Transportation Co. v. Abaunza,* 271 F. 199, 202 (5th Cir. 1921). The "judgment date" rule apparently gives way, at least in diversity contract cases where the law of the forum is applied, to the "date of breach" rule. *Jamaica Nutrition Holdings,* 643 F.2d at 379-81. The exchange rate of $1.90/British pound sterling was obtained from the exhibits introduced into evidence by Plaintiffs. At no time prior to the entry of judgment did Defendants protest the rate or suggest an alternative one, and they have not yet submitted verified proof as to the exchange rate on the date of breach.

The Court finds that the agreement between the parties was breached on November 2, 1981, the day when Anderson-Slight presented the letter detailing Plaintiffs' losses on the project. *See* Finding of Fact 14. The rate of exchange between the United States dollar and the British pound sterling on that date was 1.8725,[1] and the judgment previously entered is AMENDED as follows, pursuant to Fed. R. Civ. P. 52(b), to reflect the stated exchange rate. *See* Conclusion of Law 11.

Total British pounds sterling:	$186,288
	× 1.8725 dollars/pound
	$348,824.28
	+ $116,250.00
	+ $ 13,735.88
Total Recovery	$478,810.16

1. "Foreign Exchange Rates," *Federal Reserve Statistical Release,* week ending November 9, 1981. In this publication the Federal Reserve Bank of New York certifies for customs purposes the noon buying rate in New York City for cable transfers payable in foreign currencies.

DONE at Houston, Texas, this 18th day of April, 1984.

/s/ ROSS N. STERLING
United States District Judge